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# **General Counsel's Supplemental Report**

**January 1, 2003 – April 1, 2003**

## **Public Employment Relations Commission**

**Robert E. Anderson  
General Counsel**

**Don Horowitz  
Deputy General Counsel**

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### **Appeals From Commission Decisions**

#### **Scope-of-Negotiations Cases**

In *Wall Tp. and Wall Tp. PBA Local 234*, P.E.R.C. 02-22, 28 *NJPER* 19 (¶33005 2001), aff'd App. Div. Dkt. No. A-1640-01T2 (1/6/03), the Commission declined to restrain binding arbitration of a grievance asserting that the employer violated an agreement to promote police officers in the order set by a promotional list based on criteria unilaterally established by the employer. The Court affirmed substantially for the reasons set forth in the Commission's decision and added that the employer's contentions raised contractual issues for the arbitrator rather than negotiability defenses.

### **Commission Regulations**

At its January 30, 2003 meeting, the Commission adopted regulations for implementing the 2002 law, *N.J.S.A. 34:13A-5.5*, permitting deductions of representation fees even absent a negotiated agreement. *N.J.A.C. 19:19-1.1 to -5.2*, published at 35 *N.J.R.* 1270(a).

### **Other Court Cases**

#### **Arbitration**

The New Jersey Supreme Court has granted a petition for certification and a cross-petition for certification in *Camden Bd. of Ed. v. Alexander*, 352 *N.J. Super.* 442 (App. Div. 2002), certif. granted, 175 *N.J.* 77 (2002). This case is described on p. 7 of the annual report.

The Supreme Court denied certification in *Mt. Laurel Tp. Bd. of Ed. and Mt. Laurel Ed. Ass'n*, App. Div. Dkt. A-971-01T5 (10/17/02), certif. den., 175 N.J. 433 (2003). The case is described on p. 7 of the annual report.

In *Leodori v. CIGNA Corp.*, 175 N.J. 293 (2003), the Supreme Court held that a provision in a handbook requiring employees to arbitrate all employment-related claims could not be enforced against an in-house lawyer, the plaintiff in a CEPA case. The provision was unambiguous, but the lawyer had not actually agreed to be bound by that provision. He had not signed the "Employee Handbook Receipt and Agreement" form and the record did not otherwise unmistakably show that he had agreed to the arbitration provision.

### Termination

In *Silvestri v. Optus Software, Inc.*, 175 N.J. 113 (2003), the Supreme Court upheld a grant of summary judgment to a computer company sued by an employee who had been terminated "for failure to perform to the company's satisfaction" as required by the employment contract. The majority held that, absent language to the contrary, termination may be based on the employer's subjective

assessment of its personal satisfaction so long as the assessment is honest and genuine. Justice Zazzali's dissenting opinion would have adopted an objective standard for assessing a termination absent express language authorizing a subjective assessment.

### Back Pay

In *O'Lone v. Department of Human Services*, 357 N.J. Super. 170 (App. Div. 2003), the Court held that the Merit System Board improperly denied the back pay claim of a career service employee whose removal was reduced to a suspension. The MSB denied the claim because the employee had not sought substitute employment, but the Court held that the MSB had to determine whether the employee could have found suitable employment if he had diligently searched for it. The Court sets out the evidentiary burdens applicable to a back pay claim in a Civil Service case where an employee's misconduct justifies some discipline but not removal. Such cases differ from cases under the Law Against Discrimination where the employer's misconduct caused the unemployment in the first place. In the latter type of case, the employer bears that burden of proving that the employee failed to mitigate damages.

<b>CEPA Claims</b>
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In *Cosgrove v. Cranford Bd. of Ed.*, 356 N.J. Super. 518 (App. Div. 2003), the Court dismissed a CEPA claim filed by a custodian who asserted he was discharged for grieving the allocation of overtime assignments. The Court reasoned that a complaint regarding overtime distribution concerns a personal harm rather than the public harm required by CEPA. Further, the strong public policy against anti-union discrimination is immaterial to this CEPA case because the plaintiff's complaint is about the alleged unfair distribution of overtime, not the procedure for filing complaints through his union.